United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1152

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Docket No. 74-1152

IN THE MATTER OF THE PETITION
FOR ARBITRATION

Between

FAIR WIND MARITIME CORPORATION
as Owner of the S.S. ISABENA,

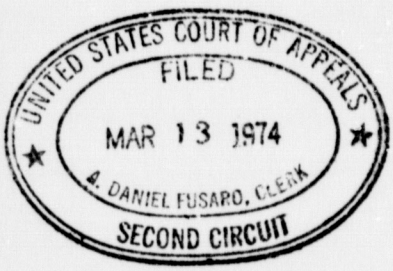
Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION,

Respondent-Appellant.

BRIEF FOR APPELLANT



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INDEX

AUTHORITIES

Cases:

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MAY IT PLEASE THE COURT:

Issues

1. Was service of the Petition made as required by 9 U. S. Code 4?
2. Is there a *bona fide* dispute between the parties?
3. Has Transworld Maritime Corporation failed, neglected or refused to arbitrate a dispute?
4. Is Fair Wind Maritime Corporation attempting to submit a frivolous issue to arbitration?

Statement of the Case

This is an appeal from the order entered in the United States District Court for the Southern District of New York by the Honorable Lawrence W. Pierce, United States District Judge, on December 17, 1973 (38a)[1] in which the Court below denied the motion of appellant, Transworld Maritime Corporation, to alter or amend its order entered on August 29, 1973.[2] In support of its final order dated December 17, 1973, a memorandum opinion was filed by the Honorable Lawrence W. Pierce, United States District Judge, on November 27, 1973. (32a)

Facts

On or about June 14, 1972, Petitioner-Appellee, Fair Wind, entered into a New York Produce Form of Charter Party with Respondent-Appellant, Transworld, under which Transworld time chartered the S. S. *Isabena* for a period of from fifteen to sixty days for the purpose of lightening grain from alongside the *Overseas Joyce,* off the coast of Pakistan near Karachi. (13a-16a)

The *Isabena* was delivered to Transworld off Karachi on or about June 23, 1972, and on or about June 24, 1972, she commenced loading grain from the *Overseas Joyce.* (22a-23a)

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[1] References to pages of the appendix are followed by the letter a.

[2] No opinion or written reasons were filed in support of the order dated August 29, 1973, and the order was endorsed on the back of the motion papers simply "Petitioner's motion is granted. Respondent's motion is denied. Submit order on notice."

The *Isabena* completed loading June 30, 1972 and was berthed in Karachi, but on July 3, 1972 was required by the Karachi Port Trust to return to a Karachi outer anchorage. About 7:30 a.m. on July 4, 1972, the *Isabena* reportedly capsized and sank, and the master and four crew members were lost. (23a)

From that time, until a letter dated June 7, 1973 was received by Admiralty Agencies Ltd., Transworld had received no communication concerning any claim against Transworld from the owners of the *Isabena*. (23a) The record does not disclose the date the letter was received.

This letter, which appears in this record only as Exhibit "A" to the petition of Fair Wind, does not disclose a claim and Transworld has never had an opportunity to agree or disagree with Fair Wind's position and, therefore, is not now aware that any dispute exists between the parties.

Assuming the letter dated June 7, 1973 (19a) was mailed on the same day that it is dated (which was Thursday), it could take as long as three days or more for this letter to reach the addressee, and it is possible that the letter did not come to the attention of the addressee prior to June 11, 1973.[3]

However, in its eagerness to present frivolous and non-arbitrable issues to an arbitrator, Fair Wind did not wait for an answer to its letter but filed its petition to compel arbitration on June 19, 1973. (1a) The record is barren of any evidence that this petition was served as required by the Federal Rules of Civil Procedure, which is stated at 9 U. S. Code 4. In the absence of proper service, Trans-

[3] The date of receipt of the letter does not appear in the record.

world never had an opportunity to answer the petition or to determine the facts and learn if there were a dispute between the parties.

Although it may be suggested that insufficiency of service has been waived by appearing in the proceeding below, the attention of the Court is invited to the Federal Rules of Civil Procedure, Rule 12(h)(1).[4]

Fair Wind did not even wait for Transworld to file answer to its petition to arbitrate, but on June 22, 1973 filed a notice of motion for an order to compel arbitration and to appoint an arbitrator.

This is not merely a technical defense because had Transworld been given the opportunity to answer the petition, it would have admitted the truth of the allegations of fact contained in paragraphs 1, 2, 3 and 4, and would have denied the truth of the allegations of fact contained in paragraphs 5 and 6. This would have placed in issue, for determination by the Court below, the contention of Transworld that no arbitrable issue has been presented to the Court and Transworld could have demonstrated the petition for arbitration did not present a *bona fide* dispute but that the petition presented frivolous and patently baseless claim for arbitration.

Thereafter, Fair Wind and Transworld filed various briefs and affidavits in support of and in opposition to Fair Wind's motion to compel arbitration, and to appoint an

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[4] This rule provides "a defense of . . . insufficiency of service of process is waived (A) if omitted from a motion made under Rule 12 or (B) if it is neither made by motion to this rule nor included in a responsive pleading . . ." No motion has been made under Rule 12, and no responsive pleading has been filed; therefore, insufficiency of service has not been waived.

arbitrator for Transworld. The motion was finally decided adversely to Transworld in the opinion of the Honorable Lawrence W. Pierce filed November 27, 1973 (32a), and the order from which this appeal is taken was filed December 17, 1973.

ARGUMENT

I.

The petition to arbitrate was not served as required by statute and Transworld Maritime Corporation has been denied its rights under 9 U. S. Code 4.

After the opinion of Judge Pierce was filed (2a), Transworld retained its present counsel to prosecute this appeal, and a thorough examination of the record and the docket entries (1a-2a) fails to disclose that the petition to compel arbitration was ever served on Transworld or its agent as required by 9 U. S. Code 4 which states "a party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in a manner provided for in such agreement . . . . Service thereof shall be made in a manner provided for by the Federal Rules of Civil Procedure." [5]

This objection is neither technical nor specious for, as will be shown, had proper service been made of the notice

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[5] To comply with this provision, service on the parties was required. *Greenwich Marine Incorporated* v. *S.S. Alexandra,* 225 F.Supp. 671 (SDNY 1964), aff'd 339 F2d 901 (CA 2-1965). The record discloses no such service.

of filing the petition, Transworld could have answered the petition for arbitration and raised issues that must be decided by the Court, but were not.

Fair Wind's eagerness to rush to arbitration has not been without purpose, and is a disingenuous attempt to force a small corporation to undergo an expensive and time consuming arbitration, in an attempt to obtain from arbitrators unknown remedies for unknown claims or disputes which could not be obtained in Court. These unknown claims are frivolous, and not subject to arbitration.

The only purported issue known to Transworld is contained in the letter marked Exhibit "A" to an affidavit of Nicholas J. Healy, Jr. (17a-19a), and that letter only hints of an alleged dispute which Fair Wind claims to exist in that Fair Wind's attorneys allege "Owners' [of the *Isabena*] claims are for the loss of the Vessel and various expenses and liabilities which may be incurred as a consequence of the Vessel capsizing at the port of Karachi". (19a)

Inquiry of Fair Wind produced only abusive memoranda and the only additional explanation of the alleged dispute in the record is found in an affidavit signed July 24, 1973 by Nicholas J. Healy, Jr., which states "Subsequent to writing the June 7 [1973] letter deponent discussed the case with attorneys for respondent and advised such attorneys that petitioner's bases for the claim for the loss of the Vessel were breach of respondent's Charter Party obligations including the obligations properly to load and stow the vessel." (17a-18a) This statement is no more informative than the June 7, 1973 letter.

In its memorandum dated July 24, 1973, Fair Wind states "petitioner could cite other provisions of the char-

ter upon which liability is predicated. See for example clause 8 of the Charter which obligates Charterers-respondent to 'load, stow, trim and discharge the vessel' ".[6] This discloses no more information than any other communication.

In fact, if this is the claim of Fair Wind, then patently the petition for arbitration is not based on an arbitrable issue, is frivolous and without merit, and should not be submitted to arbitration.[7]

Transworld's inability to bring this issue to the forefront is solely the fault of Fair Wind, which has not and will not tell either Transworld or the Court what its claim is. Transworld may agree, if it knew what the claim was and then there would be no dispute and no need for arbitration at all.

Having never received a claim that it can comprehend, and having never received proper service of Fair Wind's petition to arbitrate, Transworld has, therefore, not refused to arbitrate, because it has never disputed an arbitrable issue presented by Fair Wind. Transworld has been allowed no opportunity to participate in arbitration, because not knowing what issues are to be presented for arbitration, Transworld can not make a reasonable choice of an arbitrator.

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[6] See Clause 8 of the Charter Party which states Charterers are to load, stow, trim and discharge the cargo at their expense *under the Supervision of the "Captain"*. Fair Wind has conveniently omitted the italicized words from its memorandum.

[7] Even if matters of arbitrability are for the arbitrators, a Court should not compel arbitration of "a frivolous or patently baseless claim." *Local 205 etc.* v. *General Electric Company*, 233 F2d 85, 101 (CA 1-1956).

For the reason that the petition to arbitrat was never served on Transworld as required by 9 U. S. Code 4, and, therefore, Transworld being unaware of what, if any, claim is being made, and whether it disputes same, Transworld has not failed to carry out its arbitration agreement and the decision of the Court below should be reversed and the petition dismissed to permit Fair Wind to make proper claim against Transworld if it has one.

Transworld would then have an opportunity to agree with or dispute the claim and thus determine whether there is any issue to be arbitrated. If there is an arbitrable issue, Transworld undertakes promptly to name an arbitrator, and proceed with arbitration without the necessity of any resort to Court procedure. Transworld also undertakes to waive any defense it may have based on laches or expiration of a statute of limitation.

II.

The petition to compel arbitration is frivolous as there is no *bona fide* dispute between the parties.

Fair Wind has acted strangely in its attempting to rush unknown issues to arbitration, and in insisting that the Court must grant arbitration without any consideration of the issues to be submitted. Even if the arbitrability is to be determined by the arbitrators, the Court may grant arbitration only if the "applicant's claim is not frivolous or patently baseless".[8]

Fair Wind has consistently declined to specify its claim, solely because it knows that there is no *bona fide* dispute

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[8] See *e.g. Local 205 etc.* v. *General Electric Company*, 233 F2d 85, 101 (CA 1-1956).

and the issues it intends to present are frivolous and patently baseless, for Transworld has found none, and Fair Wind has cited, no cases in which a time charterer has been held liable for the sinking of a vessel.

The Charter Party entered into by the parties herein is merely a lease of the cargo space of the ship and is not a demise of the vessel. Clause 26 of the Charter Party (14a) states "The owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account." It is settled law that under time charters with identical provisions the owner and not the time charterer is responsible for the ship.[9]

It is true that clause 8 of the Charter Party (13a) states that "Charterers are to load, stow, trim and discharge the cargo at their expense *under the supervision of the Captain*" (emphasis supplied). This clause is no comfort to Fair Wind in asserting a *bona fide* claim.

"Under the very ordinary form of the time charter involved in this cause, it shocks knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship [to the charterers].

"But [the owner] has surrendered control of her freight and passenger capacity and handed the same over to the

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[9] For a vivid description of this concept, see *Leary* v. *United States*, 14 Wall. (81 US) 607, 610 (1872) which is a case in many respects similar to the case at bar. See also, *Reed* v. *United States*, 11 Wall. (78 US) 591, 601 (1871). "The Charterer having nothing to do with the navigation of [Vessel] can not be held responsible for the negligence of her master, who in the matter of her navigation was the agent of the owner . . . . " *The Beaver*, 219 Fed. 139 (CA 9-1915).

charterers for all lawful purposes. The ship is the owner's ship, and the master and crew are his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are servants of the charterers.

"There is in fact (to borrow a simile from another branch of law) an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and freight moneys, and the use of the vessel, master and crew, for the advancement of the charterers' gains." *The Santona*, 152 Fed. 516, 518 (SDNY-1907).

Therefore, the charterer's Agreement to load, stow and trim the ship at its expense, under the direction of the Captain, does not make the charterer responsible for the safety of the ship. The true meaning of this clause is that any directions that the master gives concerning loading, stowing or trimming which concerns the cargo, is for and on behalf of the charterer; any instructions that he gives concerning the safety of the ship, i.e., in connection with the metacentric height, proper riding at sea, etc., is for the benefit of the ship and her owners. In that capacity, the master is the servant of the owner and any instructions or errors that he might make in loading, stowing and trimming the cargo, which would cause the ship to capsize or sink would be the sole responsibility of the owner.

Therefore, if it is this issue, and it is the only one that Transworld can find in the record, that Fair Wind wishes to arbitrate, Fair Wind has presented a frivolous and non-

arbitrable issue, and its petition for arbitration should be dismissed.

The arbitration statute, now incorporated in 9 U. S. Code 4, is identical with the New York Arbitration Statute Civil Practice Law and Rules Section 7501 *et seq.* Although the right to arbitration, once there is a *bona fide* dispute, takes the matters out of the hands of the Court, it does not mean that all disputes are taken out of the hands of the Court for there are exceptions to this general policy. One prominent exception is in the case in which the asserted claim is frivolous, there is no *bona fide* dispute, and arbitration will not be required. This statement of the law is clear in New York.[10]

CONCLUSION

Transworld respectfully submits that no *bona fide* dispute has ever been submitted by Fair Wind which is the subject of arbitration, that Fair Wind's rush to arbitration is an attempt to arbitrate a frivolous and nonmeritorious claim. The order of the trial court should be reversed and the petition to arbitrate should be dismissed and the appointment of the arbitrator revoked.

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[10] *Alpert* v. *Admiration Knitwear Co., Inc.*, 304 N.Y. 1, 105 N.E. 2d 561, 563 (1952); *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 271 App.Div. 917, 67 N.Y.S.2d 317 (App.Div. 1st Dept. 1947) aff'd 297 N.Y. 519, 74 N.E.2d 464 (1947); *General Electric Co.* v. *United Electric Co. et al.*, 300 N.Y. 262, 90 N.E.2d 181 (1949). Other situations which will not be submitted to arbitration include where fraud or duress are practiced against one of the parties and renders the agreement voidable, where performance which is the subject of the demand for arbitration is prohibited by Statute, or for where a condition precedent to arbitration under the contract or Statute has not been fulfilled.

In alternative the order to arbitrate should be reversed and the appointment of the arbitrator revoked and the case remanded to permit Fair Wind to submit its claim, allow Transworld to agree with or dispute it and, if the claim then presented is not frivolous, then the matter may be submitted to arbitration.

March 13, 1974
New York, New York

Respectfully submitted,

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Certificate

I certify that a copy of the foregoing Appellant's Brief and Appendix has been served on the attorney for Fair Wind Maritime Corporation, Nicholas J. Healy, Jr., Messrs. Healy & Baillee, 29 Broadway, New York, New York 10006 by placing 2 copies of same in the United States mail, properly addressed and postage prepaid.

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Service of ~~three~~ two (2) copies of the within Brief for Appellant is hereby admitted this 13th day of March 1974

Healy & Baillie

Attorney for